

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA09-1090

NORTH CAROLINA COURT OF APPEALS

Filed: 6 April 2010

JOEY D. SCOTT,  
Plaintiff

v.

N. C. Industrial Commission  
I.C. No. TA-20478

N.C. DEPARTMENT OF  
CORRECTION,  
Defendant.

Appeal by Plaintiff from Decision and Order of the North Carolina Industrial Commission entered 28 May 2009. Heard in the Court of Appeals 22 February 2010.

*Joey D. Scott, pro se, plaintiff-appellant*

*No brief filed for defendant-appellee*

WYNN, Judge.

"In order to prevail in a negligence action, plaintiffs must offer evidence of the essential elements of negligence: duty, breach of duty, proximate cause, and damages."<sup>1</sup> "[N]o recovery is allowed when resort to speculation or conjecture is necessary to determine whether the damage resulted from the unlawful act of

---

<sup>1</sup>*Elm St. Gallery, Inc. v. Williams*, 191 N.C. App. 760, 767, 663 S.E.2d 874, 878 (2008) (quoting *Camalier v. Jeffries*, 340 N.C. 699, 706, 460 S.E.2d 133, 136 (1995)).

which complaint is made or from some other source.'" *People's Center, Inc. v. Anderson*, 32 N.C. App. 746, 748-49, 233 S.E.2d 694, 696 (1977) (quoting 22 Am. Jur. 2d, Damages § 24 (1965)). Because Plaintiff failed to present evidence showing that the actions of Defendant's employees were the proximate cause of his alleged loss of property, he cannot prevail on his negligence claim. Therefore, we affirm the Decision and Order of the North Carolina Industrial Commission.

Plaintiff Joey D. Scott was an inmate at the Lanesboro Correctional Institution in Anson County on or about 8 June 2006.<sup>2</sup> On 28 January 2008, Plaintiff filed a negligence action with the North Carolina Industrial Commission pursuant to the Tort Claims Act. Plaintiff's complaint arose out of the alleged loss or damage to personal property<sup>3</sup> occurring during its transfer by agents of Defendant Department of Correction to Plaintiff after he was moved to a different cell within the facility.

On 6 March 2008, Defendant North Carolina Department of Correction ("NCDOC") filed an "Amended Motion to Dismiss, Stay

---

<sup>2</sup>The record indicates that Plaintiff has since been moved to the Alexander Correctional Institution in Taylorsville. However, this case concerns events which allegedly occurred at the Lanesboro Correctional Institution.

<sup>3</sup>Plaintiff has included in the record the administrative remedy procedure form in which he alleges that his property "has obviously been lost or destroyed violating DOC policy and procedure." In an attached page, Plaintiff listed the items allegedly lost or damaged and their value. These include assorted cosmetics, 2 pairs of white Converse tennis shoes, and assorted canteen products including "numerous snacks, chips, beverage mixes, candy bars, soups, Tops cigarette tobacco (4), assorted batteries (8), and 39¢ stamps (15)."

Discovery, and Answer." In that motion, Defendant moved to dismiss Plaintiff's claim on the grounds of contributory negligence and failure to state a claim upon which relief can be granted.<sup>4</sup> A hearing on Defendant's motion took place on 7 May 2008 via videoconference before Donna Taylor, Special Deputy Commissioner of the North Carolina Industrial Commission. On 14 May 2008, Deputy Commissioner Taylor filed an order denying Defendant's motion to dismiss. Deputy Commissioner Taylor concluded that Plaintiff's affidavit and argument were sufficient to state a claim for negligence. The order decreed that the matter would proceed to trial on the merits at the next available hearing docket.

A trial was held before Deputy Commissioner J. Brad Donovan on 6 October 2008. On 10 October 2008, Deputy Commissioner Donovan filed a Decision and Order denying Plaintiff recovery and dismissing his claim. Plaintiff filed notice of appeal to the Full Industrial Commission. The Full Industrial Commission reviewed the matter without oral argument and, on 28 May 2009, filed a Decision and Order. The Order contained the following findings of fact:

1. On June 8 . . . plaintiff was removed from the dining hall and was taken directly to segregation. Thereafter, his personal property was removed from his cell and placed into bags. It is not clear from the record which of Defendant's employees packed

---

<sup>4</sup>The findings of Special Deputy Commissioner Taylor indicate that "NCDOC moved to dismiss Scott's claim on the grounds of: contributory negligence; and Rule 12(b)(6) failure to allege damages, failure to allege a specific act of negligence relied upon, specific performance and lack of personal and subject matter jurisdiction." However, the record on appeal includes only Defendant's amended motion to dismiss, which alleges only two grounds for dismissal.

Plaintiff's belongings. Sgt. Murray, who did not pack the items, brought the bags to Plaintiff with a DC-160 listing the items packed.

2. Plaintiff examined the contents of the bags and refused to sign the form, claiming that several items were missing that had been in his cell, including two pair [sic] of tennis shoes, one box of envelopes, cosmetics, canteen items, and a photograph of his father. Plaintiff alleges that the value of the items was approximately \$72.00, excluding the photograph which he was unable to place a monetary value upon.

3. The DC-160 form notes several items, all of which plaintiff acknowledges were returned to his possession.

4. Plaintiff filed a grievance seeking the return of his goods or payment for the missing items in the amount of \$150.00. In the response to the grievance, Defendant's personnel note that it is Plaintiff's responsibility to ensure that his door is secured at all times, inferring that his property, if missing, was taken by persons unknown while he was at the dining hall. The response further denies that the officers lost any of Plaintiff's property, and that Plaintiff received everything that was packed by the officers.

5. Plaintiff testified that when he was removed from the dining hall he requested that his cell be locked and "capped" to protect his property while he was in segregation. Plaintiff further testified that he "always" closed his door when he left the cell for any reason.

The Commission concluded that Plaintiff "failed to show by the greater weight of the evidence that defendant was negligent." Consequently, the Commission ordered that Plaintiff recover nothing, and dismissed his claim. On appeal, Plaintiff alleges errors in the Commission's findings of fact and its conclusions of

law.

I.

Plaintiff first argues that the Commission erred by finding as fact that (1) "[i]t is not clear from the record which of Defendant's employees packed Plaintiff's belongings" and (2) Plaintiff acknowledged the return of the items listed on the DC-160.<sup>5</sup>

Pursuant to the North Carolina Tort Claims Act, "the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2009). "This is so even if there is evidence which would support findings to the contrary." *Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. 402, 405, 496 S.E.2d 790, 793 (1998) (citing *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 683-84, 159 S.E.2d 28, 30-31 (1968)). "The burden is on an appealing party to show, by presenting a full and complete record, that the record is lacking in evidence to support the Commission's findings of fact." *Dolbow v. Holland Industrial*, 64 N.C. App. 695, 696, 308 S.E.2d 335, 336 (1983), *disc. rev. denied*, 310 N.C. 308, 312 S.E.2d 651 (1984).

Our review of Plaintiff's first argument on appeal is hampered because he has "included no transcript or narration of the evidence upon which this Court can fully review this assignment of error." *Id.* When "[t]he record does not contain [a transcript of] the oral testimony . . . the court's findings of fact are presumed to

---

<sup>5</sup>A "DC-160" is a form used by Defendant's Division of Prisons which bears the title "Personal Property Inventory."

be supported by competent evidence.'" *Davis v. Durham Mental Health/Dev. Disabilities Area Auth.*, 165 N.C. App. 100, 111, 598 S.E.2d 237, 245 (2004) (quoting *Fellows v. Fellows*, 27 N.C. App. 407, 408, 219 S.E.2d 285, 286 (1975)). "In a nonjury trial, in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence in making his decision." *City of Statesville v. Bowles*, 278 N.C. 497, 502, 180 S.E.2d 111, 114-15 (1971) (citations omitted).

Because Plaintiff failed to include in the record on appeal a copy of the transcript of the hearing before Deputy Commissioner J. Brad Donovan on 6 October 2008, we are unable to ascertain what evidence was before the Full Industrial Commission. As such, the Full Commission's findings are presumed to be supported by competent evidence and, as such, insulated from Plaintiff's contentions.

## II.

Plaintiff next argues that the Commission committed reversible error by concluding that Plaintiff failed to prove Defendant's negligence. Plaintiff attacks the portions of the Order and Decision which state it was "equally likely that plaintiff's property was removed by someone other than the officers" and "there is no evidence specifically tying the officers to the missing items."

These statements, although labeled as conclusions of law, are properly viewed as findings of fact. See *Dunevant v. Dunevant*, 142 N.C. App. 169, 173, 542 S.E.2d 242, 245 (2001) ("[A] pronouncement

by the trial court which does not require the employment of legal principles will be treated as a finding of fact, regardless of how it is denominated in the court's order." (citations omitted)). "A 'conclusion of law' is a statement of the law arising on the specific facts of a case which determines the issues between the parties." *In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999) (citation omitted). In contrast, "[f]indings of fact are statements of what happened in space and time." *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 351, 358 S.E.2d 339, 346 (1987). The two statements in question amount to findings that Plaintiff presented no evidence linking the officers to the property at issue. These findings, like those addressed above, are presumed to be supported by competent evidence in light of Plaintiff's failure to include in the record on appeal a transcript of the testimony received below. *Davis*, 165 N.C. App. at 111, 598 S.E.2d at 245. More importantly, these findings support the Commission's conclusion that Plaintiff failed to prove the negligence of Defendant.

When considering an appeal from the Industrial Commission concerning a claim under the Tort Claims Act, our review of the Commission's conclusions is limited to a determination of "whether the Commission's findings of fact justify its conclusions of law and decision." *Simmons*, 128 N.C. App. at 406, 496 S.E.2d at 793.

"Under the Tort Claims Act negligence . . . and proximate cause . . . are to be determined under the same rules as those applicable to litigation between private individuals.'" *Medley v.*

*N.C. Dep't of Correction*, 330 N.C. 837, 840-841, 412 S.E.2d 654, 657 (1992) (quoting *Barney v. Highway Comm.*, 282 N.C. 278, 284, 192 S.E.2d 273, 277 (1972)). To prevail in a negligence action, "Plaintiff must show that '(1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury.'" *Drewry v. N.C. Dep't of Transp.*, 168 N.C. App. 332, 337, 607 S.E.2d 342, 346 (2005) (quoting *Woolard v. N.C. Dep't of Transp.*, 93 N.C. App. 214, 217, 377 S.E.2d 267, 269 (1989)). When pursuing a claim of negligence under the Tort Claims act, "[t]he burden of proof [to show negligence is] on the plaintiff." *Id.* (quoting *Bailey v. N.C. Dep't of Mental Health*, 2 N.C. App. 645, 651, 163 S.E.2d 652, 656 (1968)).

The findings of fact made by the Commission establish that Plaintiff has failed to carry his burden of establishing that the actions of Defendant's employees were the proximate cause of his injury. Here, the Commission found that there was no evidence linking the officers to the missing items, which justified the Commission's conclusion that the actions of the officers were not the proximate cause of the loss of those items. The Commission's mention of the equal likelihood "that plaintiff's property was removed by someone other than the officers" further establishes Plaintiff's failure to prove the necessary degree of causation.

"Evidence is usually not required in order to establish and justify a finding that a party has failed to prove that which he

affirmatively asserts. It usually occurs and is based on the absence or lack of evidence." *Bailey v. N.C. Dep't of Mental Health*, 2 N.C. App. 645, 651, 163 S.E.2d 652, 656 (1968). Because Plaintiff failed to present sufficient evidence of proximate causation, the Commission did not err by finding that Plaintiff failed to establish Defendant's negligence. Accordingly, Appellant's argument is without merit.

III.

Lastly, Plaintiff challenges the veracity of statements included in a report documenting the Administrative Remedy Procedure followed by the Department of Correction. However, an inquiry into the credibility of evidence is beyond the permissible scope of review by this Court. "[W]hen considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Simmons*, 128 N.C. App. at 405-06, 496 S.E.2d at 793. Plaintiff's arguments do not directly address the Commission's findings or its conclusions. In addition, "the [F]ull Commission is the sole judge of the weight and credibility of the evidence." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "The appellate courts do not retry the facts, notwithstanding that the appellate court, if it had been the fact finding body, might have reached a different conclusion." *Taylor v. Jackson Training School*, 5 N.C. App. 188, 191, 167 S.E.2d 787, 789 (1969). Accordingly, we decline

to address the credibility of the statements challenged by Defendant.

Affirmed.

Chief Judge MARTIN and Judge STEPHENS concur.

Report per Rule 30(e).